

ISSUE DATE: May 3, 1999

DOCKET NO. P-5692, 421/M-99-196

ORDER REJECTING RESALE AGREEMENT AND REQUIRING REFILING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayer
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Resale Agreement
Submitted by U S WEST Communications, Inc.
and DIECA Communications, Inc. d/b/a Covad
Communications Company

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PROCEDURAL HISTORY

On February 18, 1999, U S WEST Communications, Inc. (USWC) and DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed a request for approval of their (the Companies') Resale Agreement (Agreement).

On February 26, 1999, the Minnesota Department of Public Service (the Department) filed its comments, recommending that the Commission reject the Companies' Agreement.

The Commission met on April 6, 1999 to consider this matter.

FINDINGS AND CONCLUSIONS

I. THE COMPANIES' AGREEMENT

On January 15, 1999, the Companies entered into an Agreement pursuant to § 252(e) of the Telecommunications Act of 1996. In their joint filing February 18, 1999, the Companies stated that there were no unresolved issues between them and the Agreement was comprehensive of all items necessary. Both Companies also stated that the Agreement neither discriminates against a telecommunications carrier not a party to the proceeding. Further, the Companies denied that the agreement was inconsistent with the public interest.

II. THE DEPARTMENT'S COMMENTS

The Department stated that the Companies' Agreement contained nine provisions previously rejected by the Commission:

1. Section 9.2.2.4.4 Interim Number Portability
2. Section 11.3.2 Ordering and Maintenance
3. Section 11.10.5 Payment
4. Section 14. U S WEST Dex
5. Section 26.11 Assignment
6. Section 26.12 Default
7. Section 26.17 Dispute Resolution
8. Section 26.23 No Third Party Beneficiaries
9. Section 26.26 Amendment

The Department recommended that the Commission reject the Companies' Agreement and require corrections to the nine cited provision.

III. COMMISSION ANALYSIS

A. Background

The Federal Act permits telecommunications companies to negotiate an interconnection agreement with an incumbent local exchange carrier to interconnect with and use the incumbent's network for the purpose of providing competitive local exchange service. The Federal Act specifies the Commission's role with respect to a negotiated agreement for the resale of local exchange service. Section 252(e) states, in relevant part:

(e) Approval by State Commission. —

(1) Approval Required. — Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for Rejection. — The State commission may only reject —

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that —

(i) an agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

B. The Companies' Interconnection Agreement

The Commission has reviewed the Interconnection Agreement that the Companies propose to adopt. None of its provisions are discriminatory but several are inconsistent with the public interest. The Commission concurs with the recommendations of the Department regarding the nine cited provisions:

1. Section 9.2.2.4.4 Interim Number Portability

The Commission finds that the public interest requires removal of section 9.2.2.4.4.1 which states:

Full payment for the account (including directory advertising charges associated

with the end user's telephone number) is made by end user or INP Requestor agrees to make full payment on behalf of end user.

The Commission has previously rejected agreements which prevented INP for customers with accounts in arrears. See for example the Commission's Order dated August 13, 1997 in Docket No. P-5426,421/M-97-850 regarding the interconnection agreement between USWC and KMC Telecom Inc.

The Commission has consistently determined that number portability is essential to a competitive market because customers who must change telephone numbers to change carriers had strong incentives to remain with their current carrier.

2. Section 11.3.2 Ordering and Maintenance

The public interest requires removal of the following quoted language from Section 11.3.2:

"the Parties agree that they will not transfer to each other their respective end users whose accounts are in arrears."

As in previous Orders, the Commission finds that the cited language improperly restricts customer transfer to a new carrier and is, essentially, anti-competitive. The legitimate business goal of recovering accounts that are in arrears can be pursued through collection proceedings against delinquent customers rather than restricting the transfer of such customers to a new carrier.

3. Section 11.10.5 Payment

The public interest requires removal of the following quoted language:

"USWC may disconnect for the failure by Covad to make full payment for the resold services provided under this Agreement"

The Commission has consistently held that disconnection cannot occur without its approval. Substituting the following language would correct the deficiency:

"Neither Party shall disconnect service to the other Party without Commission approval."

4. Section 14. U S WEST Dex

The Commission recognizes that recent decisions by the United States District Court for the District of Minnesota will occasion Commission review of the Dex provisions in all interconnection agreements approved by the Commission. However, for the moment, at the suggestion of the parties including USWC, the Commission will maintain continuity with previous Orders and require insertion of the following language:

US WEST is an affiliate of US WEST DEX. Given this status, US WEST will ensure that it is treated in a competitively neutral manner by US WEST DEX vis a vis the Carrier. If US WEST receives a commission from US WEST DEX for placement of yellow pages advertising, the Carrier shall receive the same commission. US WEST DEX will give the Carrier the same opportunity to provide directory listings as it provides to US WEST (for example through some type of bidding process). If the Carrier is not given the same directory listing opportunity as US WEST, the Carrier shall receive a share of the revenues (based on the percentage of lines belonging to that Carrier in the particular list) that US WEST receives from US WEST DEX. US WEST shall make its contracts with US WEST DEX available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at the same terms as US WEST.

5. Section 26.11 Assignment

The currently proposed section regarding assignment of rights and obligations does not require the party making the assignment to notify the Commission prior to the effective date of the assignment. Such notice would give the Commission an opportunity to protect the public interest by assuring continuity of quality service in the event a new operator (assignee) is contemplated. As the Commission has found previously, the absence of such a requirement is contrary to the public interest. Accordingly, the Commission will require the following language:

The Party making the assignment shall notify the Commission 60 days in advance of the effective date of the assignment.

6. Section 26.12 Default

The currently proposed section regarding default does not require notification of the Commission prior to termination of the Agreement. Such notice would give the Commission an opportunity to protect the public interest (assure continuity of quality service) in the context of a troubled contract. As the Commission has found previously, the absence of such a requirement is contrary to the public interest. Accordingly, the Commission will require the following language:

If either Party defaults . . . the other Party must notify the Minnesota Public Utilities Commission in writing and may seek legal and/or regulatory relief.

7. Section 26.17 Dispute Resolution

The Commission finds that absence of explicit language acknowledging the Commission's ongoing authority to enforce arbitration agreements, including the authority to reject or modify the independent operator's decision creates a lack of clarity that is contrary to the public interest. Accordingly, the Commission will require the following additional underlined language:

The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof subject to review by the Commission. The parties shall submit a Copy of each arbitration opinion to the Commission, the Department of Public Service, and the Office of Attorney General, Residential and Small Business Utilities Division. The arbitrator's decision shall remain in effect unless the Commission acts to suspend, modify or reject the decision within 45 days.

8. Section 26.23 No Third Party Beneficiaries

As currently drafted, this section does not require that the Companies give notice to the Commission of any lawsuits or proceedings to ensure that the Commission has the opportunity to intervene on behalf of the public interest. The Commission finds that the absence of such language creates a lack of clarity that is contrary to the public interest. Accordingly, the Commission will require the following additional language:

Notwithstanding the foregoing, the Parties agree to give notice to the Commission of any lawsuits or other proceedings that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in these proceedings on behalf of the public interest.

9. Section 26.26 Amendment

As currently drafted, this section does not state that the Commission must approve any modification, supplement or amendment to the Agreement. The Commission finds that the absence of such language creates an unreasonable risk that the parties will be unclear on this point. Because amendments to the Agreement can affect the public interest so substantially, any uncertainty between the parties on whether prior Commission approval is required is contrary to the public interest. Accordingly, the Commission will require the following additional language:

The Commission must approve of any amendment, modification, or supplement to this Agreement.

IV. COMMISSION ACTION

Based on the foregoing analysis, the Commission will reject the Companies' proposed Interconnection Agreement and will require them to refile, correcting the above-cited deficiencies.

ORDER

1. The Commission rejects the interconnection agreement between U S WEST Communications, Inc. (USWC) and DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) for the reasons set forth above.
2. Within two weeks of the date of this Order USWC and Covad (the Companies) shall file a new agreement correcting the deficiencies noted above or a statement explaining that they

will not be making such a filing.

3. The Commission delegates to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiencies noted in this Order have been corrected as recommended herein, and to issue a letter to the parties approving the contract as of the date of filing.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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